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EXAMINER

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/774,275
Filing Date: January 30, 2001
Appellant(s): STRAND ET AL.

MAILED
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GROUP 3700

Leslie S. Miller
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 03/24/2006 appealing from the Office action mailed 04/22/2005.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief. The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows: Claims 86-88 and 106-108 stand rejected under 35 U.S.C. 112, first paragraph as failing to comply with the enablement requirement.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

3,181,583	LINGENFELTER et al.	05-1965
5,875,611	PLOURDE	03-1999

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 86-88 and 106-108 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. The specification fails to provide an adequate written description of the areas of structural weakness nonlinearly extending across a width dimension or a length dimension.

Claims 75-77, 81-85, 89, 90, 96, 97, 101-105, 109, 110, 138-141, 143, 145, 147 and 152 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611 (both previously cited).

Lingenfelter discloses the claimed device except for each of the front and rear panels 19, 21 having an area of structural weakness. Plourde '611 discloses that it is known in the art to provide an area of structural weakness 40 in the front and rear panels of an analogous bag. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the front and rear panels of Lingenfelter with the areas of structural weakness of Plourde '611, in order to provide a wider access opening to the interior of the bag.

Claims 78 and 98 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611.

Lingenfelter and Plourde '611 disclose the claimed invention, as discussed above, except for the skirt web material being coupled to the reclosable fastener structure instead of being integral therewith. It would have been obvious to one having ordinary skill in the art at the time the invention was made to couple the skirt web material to the reclosable fastener structure in Lingenfelter, since it has been held that constructing a formerly integral structure in various elements involves only routine skill in the art. *Nerwin v. Erlichman*, 168 USPQ 177, 179.

Claims 86-88 and 106-108 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611.

Lingenfelter and Plourde '611 disclose the claimed invention, as discussed above, except for the areas of structural weakness nonlinearly extending across a width dimension or a length dimension. It would have been an obvious matter of design choice to make the areas of structural weakness of Plourde '611 extends nonlinearly across a width dimension or a length dimension. A change in form or shape is generally recognized as being within the level of ordinary skill in the art, absent any showing of unexpected results. *In re Dailey et al.*, 149 USPQ 47.

Claims 91, 92, 111, 112, 148 and 149 rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter, Plourde '611 and admitted prior art.

Lingenfelter and Plourde '611 disclose the claimed invention except for the areas of structural weakness comprising microperforations or scoring instead of perforations. It would have been obvious to one having ordinary skill in the art at the time the invention was made to replace the perforations of Plourde '611 with microperforations or scoring in order to facilitate the tearing of the Lingenfelter bag material would be within the level of ordinary skill in the art. Applicant's lack of remarks, filed 03/14/2005, regarding the Examiner's Official Notice in the 09/10/2004 Office action is considered an admission of prior art.

Claims 93-95, 113-115 and 146 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611 as applied to claims 75, 96 and 138, and in further view of Peppiatt '143.

Lingenfelter and Plourde '611 disclose the claimed invention, as discussed above, except for the material forming the bag comprising a laminate film. Peppiatt '143 teaches that it is known in the art form an analogous bag from a multiple laminate film. It would have been obvious to one having ordinary skill in the art at the time the invention was made to use multiple laminate film to form the bag of Lingenfelter, taught to be desirable by Peppiatt '143, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.

Claim 142 is rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611.

Lingenfelter and Plourde '611 disclose the claimed invention except for areas of structural weakness comprising a hermetic seal. It would have been obvious to one having ordinary skill in the art at the time the invention was made to hermetically seal the areas of structural weakness in Plourde '611 since it was known in the art that hermetically sealed areas of structural weakness in bags prevents spoiling of the bag contents while facilitating the initial opening of the bag.

Claims 116 and 150 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611.

Lingenfelter and Plourde '611 disclose the claimed invention except for at least one area of structural weakness having at least one tear tape. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide at least one structural area of weakness of Plourde '611 with a tear tape since it was known in the art that tear tapes facilitate the tearing of a bag along the area of structural weakness.

Claim 151 is rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611.

Lingenfelter and Plourde '611 disclose the claimed invention except for the opposite ends of the areas of structural weakness having notches. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide notches at opposite ends of the areas of structural weakness in Plourde '611 since it was known in the art that notches at opposite ends of the areas of structural weakness facilitate the initiation of tearing along the areas of structural weakness.

Claim 153 is rejected under 35 U.S.C. 103(a) as being unpatentable over Lingenfelter and Plourde '611.

Lingenfelter and Plourde '611 disclose the claimed invention except for the reclosable fastener having slider. It would have been obvious to one having ordinary

skill in the art at the time the invention was made to provide the reclosable fastener of Lingenfelter with a slider since it was known in the art that sliders facilitate the opening and closing of reclosable fasteners.

(10) Response to Argument

In response to appellant's argument "The 35 U.S.C. § Rejections Fail to Present a Prima Facie Case of Obviousness" because there is no suggestion to combine the Lingenfelter and Plourde references, the Examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Plourde discloses "perforations 40, so that access to the interior of the bags 16 through what will eventually be their tops or mouths may be had." See column 3, line 66 through column 4, line 2. The Examiner disagrees with appellant's remark that the opening would be no wider than it would be without adding the lines of weakness from Plourde to Lingenfelter. The difference in the width of the opening would be measured by the amount of bag material removed between the two lines of perforations 40, shown in cross-section in Fig. 4 of Plourde, as compared to no bag material removed by the single line of perforations as shown in Lingenfelter.

In response to appellant's arguments against the Lingenfelter and Plourde references individually on pages 16-17 of the 03/24/2006 Appeal Brief, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

In response to appellant's argument that "The 35 U.S.C. § Rejections Fail to Teach the Inventions As Claimed" because the Examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

In response to appellant's argument "The Rejection of Claims 75-77, 81-85, 89, 90, 96, 97, 101-105, 109, 110, 116, 138-141, 143, 145, 147, and 152 (including independent Claims 75, 96, 116, and 138 under 35 U.S.C. Section 103(a) as being unpatentable over Lingenfelter (U.S. Patent No. 3,181,583) in combination with Plourde (U.S. patent No. 5,875,611) Fails to Present a Prima Facie Case of Obviousness" because "The April 22, 2005, Office Action did not present any finding regarding the knowledge one skilled in the art would have had, or any reason, either in the references themselves or in the possession of one skilled in the art, as to why one skilled in the art would have made the combination cited in the obviousness rejection." As discussed

above, Plourde discloses "perforations 40, so that access to the interior of the bags 16 through what will eventually be their tops or mouths may be had." See column 3, line 66 through column 4, line 2. Regarding appellant's remark that "there is no difference in the width of the opening to the bag achieved by the combination," the cross-section of Plourde, as shown in Fig. 4, clearly illustrates that the difference in the width of the opening would be measured by the amount of bag material removed between the two lines of weakness 40 as compared to no bag material removed by a single line of weakness. Appellant's remark that "after the material between the perforations 40 is removed (as best shown in Fig. 4), the remaining portions of the sheet material will likely flop toward each other, thereby actually narrowing the width of the opening" is opinion and completely unsubstantiated.

Appellant's argument that "The Lingenfelter and Plourde '611 References Cited in the 35 U.S.C. § 103(a) Rejection Do Not Teach the Invention as Defined in Claims 75-77, 81-85, 89, and 90 (including independent Claim 75) merely amounts to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references.

In response to appellant's repeated arguments that the Examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a

reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Regarding appellant's repeated arguments (with respect to claims 75, 96 and 116) that "The Lingenfelter and Plourde '611 References Do Not Teach the Fold Between Front and Rear Panels Forming the Bag With Areas of Structural Weakness on Opposite Sides of the Fold" because it "involves replacing the bag 10 of the Lingenfelter reference with the tubular sheet material 10 of the Plourde '611 reference". Appellant's arguments are based on a misinterpretation and misrepresentation of the "September 10, 2004" [sic] Office action. Appellant is reminded that the rejection is based upon providing the front and rear panels of Lingenfelter, which already shows a web of material having a fold in Fig. 3 and an open bottom in Fig. 1, with the lines of weakness 40 in Fig. 4 of Plourde. Nowhere in the 04/22/2005 Final office action did the Examiner assert that it would have been obvious to replace the web material of Lingenfelter with the tubular sheet material of Plourde.

Regarding appellant's repeated arguments (with respect to claims 75, 96, 116 and 138) that "The Lingenfelter and Plourde '611 References Do Not Teach the Limitation that the Distal Margins of the Skirt Structures Are Coupled to the Web Material Forming the Bag at Corresponding Opposed Location" because both Lingenfelter and Plourde attach at an intermediate portion of the skirt structure of their respective fasteners rather than the distal portions. To the degree that the claims explicitly recite the distal margins of the skirt structure being *directly* coupled to the web material forming the bag, the distal margins of the skirt structure in Lingenfelter and

Plourde are coupled to the web material forming the bag, via intermediate portions of the structure; thus meeting appellant's claims.

In response to appellant's repeated arguments that Plourde is inconsistent with Lingenfelter, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). Appellant's reliance on the "offset" nature of Plourde's seals to argue that the limitations are not taught in the cited art is confusing, since Lingenfelter clearly shows the distal margins of the skirt structure being coupled to the web material at corresponding locations as claimed and nowhere in the 09/10/2004 Office action was it suggested coupling distal margins of the skirt structure of Lingenfelter to the web material in a manner shown by Plourde. Applicant appears to, again, misinterpret the Office action.

Appellant's argument that "The Lingenfelter and Plourde '611 References Cited in the 35 U.S.C. § 103(a) Rejection Do Not Teach the Invention as Defined in Claims 75-77, 81-85, 89 and 90 (including independent Claim 75)" merely amounts to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references.

Appellant's argument that "The Lingenfelter and Plourde '611 References Cited in the 35 U.S.C. § 103(a) Rejection Do Not Teach the Invention as Defined in Claims 96, 97, 101-105, 109, and 110 (including independent Claim 96)" merely amounts to a

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general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references.

Appellant's argument that "The Lingenfelter and Plourde '611 References Cited in the 35 U.S.C. § 103(a) Rejection Do Not Teach the Invention as Defined in Claim 116" merely amounts to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references.

Appellant's argument that "The Lingenfelter and Plourde '611 References Cited in the 35 U.S.C. § 103(a) Rejection Do Not Teach the Invention as Defined in Claims 138-141, 143, 145, 147, and 152 (including independent Claim 138)" merely amounts to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references.

Regarding appellant's argument (with respect to claim 138) that "The Lingenfelter and Plourde '611 References Do Not Teach the Front and Rear Panels Forming the Bag Coupled Together With Areas of Structural Weakness Below the Tops of Front and Rear Panels" because it "involves replacing the bag 10 of the Lingenfelter reference with the tubular sheet material 10 of the Plourde '611 reference". Appellant's arguments are based on a misinterpretation and misrepresentation of the "September 10, 2004" [sic] Office action. Appellant is reminded that the rejection is based upon providing the front and rear panels of Lingenfelter, which already shows a web of material having a

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fold in Fig. 3 and an open bottom in Fig. 1, with the lines of weakness 40 in Fig. 4 of Plourde. Nowhere in the 04/22/2005 Final office action did the Examiner assert that it would have been obvious to replace the web material of Lingenfelter with the tubular sheet material of Plourde.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



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Conferees:



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Robin A. Hylton
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